No. 17-333

IN THE

Supreme Court of the United States

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, and SHARON STRINE,

Appellants,

v.

LINDA H. LAMONE, State Administrator of Elections, and DAVID J. MCMANUS, JR., Chairman of the Maryland State Board of Elections,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF PROFESSOR MICHAEL KANG AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Michael S. Kang is the Thomas Simmons Professor at Emory University School of Law and a nationally recognized expert on redistricting and election law.[2] Professor Kang holds a J.D. from the University of Chicago School of Law and a Ph.D. in Government from Harvard University. The American Academy of Law Schools recognized Professor Kang's recent article, *Gerrymandering and the Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017), as its Best Election Law Paper of 2017. In that article, Professor Kang argues that legislative redistricting, like all lawmaking, must be supported by a legitimate government purpose and that to have a rational basis, partisan effects of redistricting must result from the government's pursuit of legitimate objectives. If redistricting effects are not so justified but instead are the result of the government's pursuit of partisan advantage, Professor Kang submits that the state's map should be rejected as unconstitutional. Such an approach to the constitutionality of redistricting would be consistent with well-developed constitutional norms that are embedded in the Court's decisions. *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) (strongly suggesting that partisan advantage is an illegitimate state interest in redistricting under the Fourteenth

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and his counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus curiae* briefs have been filed with the Clerk's office.

[2] The views expressed herein are Professor Kang's alone and do not represent the views of Emory University School of Law.

Amendment's one person, one vote doctrine); *Cook v. Gralike*, 531 U.S. 510, 524–27 (2001) (rejecting a ballot provision "plainly designed to favor [certain] candidates" as a legitimate state interest under the Elections Clause); *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (holding that partisan advantage is not a legitimate state interest in government hiring decisions under the First Amendment).

Professor Kang takes an interest in this case because he believes that consideration of his thesis would assist the Court in resolving the issues presented here and in *Gill v. Whitford*, No. 16-1161 (argued Oct. 3, 2017).

SUMMARY OF ARGUMENT

In keeping with this Court's prior decisions under the First Amendment, Fourteenth Amendment, and the Elections Clause, U.S. Const. Art. I, § 4, a redistricting plan should be rejected as unconstitutional to the extent that its purpose is to achieve partisan advantage. As Justices Stevens and Breyer have explained, "any decision to redraw district boundaries—like any other state action that affects the electoral process—must, at the very least, serve some legitimate governmental purpose" beyond "a purely partisan desire." *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 448 (2006) (Stevens, J., concurring in part and dissenting in part).

By focusing primarily on whether a redistricting plan serves legitimate state interests—rather than on the magnitude of its partisan effects—courts would assess redistricting plans in a framework that is "clear, manageable, and politically neutral," and consistent with the broader body of constitutional law,

including this Court's one person, one vote doctrine. *Vieth v. Jubelirer*, 541 U.S. 267, 307–08 (2004) (Kennedy, J., concurring in the judgment). Within the scope of the one person, one vote doctrine, the Court has recognized that if population deviations across districts advantage one party over another and cannot be explained by a legitimate state purpose, then the redistricting map is unconstitutional. *See Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., joined by Breyer, J., concurring). That is true even where the deviations at issue are not large. *Id.* By contrast, when the population deviations' partisan effects can be explained as the necessary consequence of the government's pursuit of legitimate state interests, like compliance with the Voting Rights Act, the courts have ruled that the redistricting map and its partisan effects are constitutionally permissible. *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1309 (2016). *Amicus* urges that the partisan effects from an allegedly partisan gerrymander should likewise be justified by reference to the pursuit of legitimate government interests in redistricting, as opposed to bare partisanship.

Practical acknowledgement that a political party might consider partisan advantage in drawing a map should not mean that seeking partisan advantage is a legitimate basis for drawing the map. "[T]he drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power," *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), is directly at odds with the broad constitutional norm against government partisanship that appears throughout law-of-democracy jurisprudence.

The purpose-based standard *amicus* advocates rejects the assumption advanced by Justice Scalia that a significant measure of partisanship must be tolerated in the redistricting process so long as it is not "excessive." *Vieth*, 541 U.S. at 293 (plurality opinion). In seeking to apply that standard in redistricting cases, courts have struggled to find an acceptable limit for partisanship in drawing district lines, and the effort has so far failed to yield a "clear, manageable, and politically neutral" standard for assessing the constitutionality of a redistricting plan that entrenches one political party at the expense of another. *Id.* at 307–08 (Kennedy, J., concurring in the judgment). Seeking to establish an objective constitutional standard based on an assessment of whether the partisan effect of a particular redistricting plan is "excessive," and only then unconstitutional, has understandably vexed the courts because it tolerates to a significant degree illegitimate government support for partisan advantage.

As illustrated by the one person, one vote cases, the excessiveness of a redistricting plan's partisan effects should be relevant to the constitutional inquiry, but should not be the determinative touchstone for constitutionality.

ARGUMENT

I. PURSUIT OF PARTISAN ADVANTAGE CANNOT BE A LEGITIMATE BASIS FOR REDISTRICTING.

This Court's redistricting case law rejects the pursuit of partisan advantage as an illegitimate basis for lawmaking. Because it is not legitimate government activity, the pursuit of partisan advantage—"subordinat[ing] adherents of one political party and

entrench[ing] a rival party in power," *Ariz. State Leg.*, 135 S. Ct. at 2658—cannot be a rational basis for redistricting. In redistricting, legislatures may consider legitimate political factors, such as respect for traditional political boundaries and preservation of communities of interest; but, to the extent that the drawing of a district map can only be explained by the pursuit of partisan advantage, it is inconsistent with the protections of the First and Fourteenth Amendments and with courts' decisions under the Elections Clause, U.S. Const. Art. I, § 4.

In his plurality opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), Justice Scalia observed that, in the government's pursuit of legitimate lawmaking interests, the government is entitled to weigh political considerations in redistricting, including potential partisan implications. That observation is not—and should not be allowed to become—a sanction for government officials' actual pursuit of electoral advantage for one party at the expense of the other. Justice Scalia could cite no precedent in his partisan gerrymandering opinions for the assertion that partisan advantage "is a traditional criterion, and a constitutional one, so long as it does not go too far." *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting). As Justice Stevens countered in *Vieth*, before *Vieth*, "there ha[d] not been the slightest intimation in any opinion written by any Member of [the] Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Vieth*, 541 U.S. at 336–37 (Stevens, J., dissenting).

Amicus submits that by insisting that there be a legitimate government interest for redistricting, the Court would provide a "clear, manageable, and politically neutral" standard. *Id.* at 307–08 (Kennedy, J.,

concurring in the judgment). Recent lower court decisions in this and other cases demonstrate the manageability of such a purpose-focused approach to the review of partisan gerrymandering. Those decisions have tracked Justice Kennedy's opinion in *Vieth* and have inquired "not whether political classifications were used" or how excessive the partisan advantage is, but instead whether the government acted impermissibly with the "purpose . . . of imposing burdens on a disfavored party and its voters." *Id.* at 315 (Kennedy, J., concurring in judgment).

A. This Court has not accepted partisan advantage as a legitimate basis for redistricting.

As the Court has struggled to articulate a standard for addressing the constitutionality of partisan gerrymandering, Justices have disagreed about whether only "excessive" gerrymanders violate the Constitution, or whether any redistricting for the purpose of attaining partisan advantage is impermissible. The latter position is consistent with the Court's decisions in directly related areas. While the Court has long recognized that legislatures are partisan bodies, the Court has not held that the government may rely on pure partisanship as a legitimate basis for its decisions, regardless of the magnitude of the partisan effect. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 356 (1976) (holding that partisan advantage is not a legitimate state interest in government hiring decisions under the First Amendment).

This Court first addressed the constitutionality of partisan gerrymandering in *Davis v. Bandemer*, 478 U.S. 109 (1986), when it accepted that the issue was justiciable but articulated an effects-focused standard

that so far has not been met. In *Bandemer*, the Court considered an equal-protection challenge to the 1981 decennial redistricting of the Indiana state legislature. Despite the district court's finding that the Republican-majority legislature drew districts with "simply no conceivable justification" other than "protecting its incumbents and creating every possible 'safe' Republican district possible," *Bandemer v. Davis*, 603 F. Supp. 1479, 1487–88 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986), this Court held that in order to succeed, plaintiffs needed to prove discriminatory effect by showing that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Bandemer*, 478 U.S. at 132 (plurality opinion). The panel below found both a partisan purpose and effect, but the Court declined to find a constitutional violation, because the effects did not meet a threshold for discriminatory vote dilution. *Id.* at 143. The result was to preserve a map and voting processes that avowedly served the partisan purpose of keeping a political party in control, an intentional burdening of voting rights.

Returning to the question eighteen years later, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), this Court again held that partisan gerrymandering cases were justiciable, but rejected the *Bandemer* discriminatory effects standard without articulating a new standard. In *Vieth*, the fractured Court put forward three distinct constitutional rationales and no controlling legal standard. Justice Scalia, writing for a four-member minority of the Court, opined that partisan gerrymandering cases are nonjusticiable despite "the incompatibility of severe partisan gerrymanders with democratic principles" and the recognition that "an excessive injection of politics is *un*lawful" in legislative districting. *Vieth*,

541 U.S. at 292–93 (plurality opinion). Justice Stevens, in his dissenting opinion, denied that "a naked purpose to disadvantage a political minority would provide a rational basis" for a redistricting plan. In his view, the appropriate constitutional question was "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles." *Id.* at 339 (Stevens, J., dissenting). Justice Kennedy, in a concurring opinion, wrote that "[b]ecause there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for identifying unconstitutional partisan gerrymandering." *Id.* at 307–08 (Kennedy, J., concurring in the judgment).

Justice Scalia's plurality opinion, while not controlling, has nevertheless guided subsequent discourse on the question of whether partisan motivations could constitute a lawful basis for a redistricting plan. He wrote that because legislative redistricting was contemplated in the Constitution, *see* U.S. Const. Art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"), and because partisan redistricting had been common in American politics since the colonial period, "partisan districting is a lawful and common practice." *Vieth*, 541 U.S. at 286 (plurality opinion). In Justice Scalia's view, although "excessive" partisanship was unlawful, the question was not justiciable because it was impossible to craft a workable standard to assess "[h]ow much political motivation and effect is too much." *Id.* at 297 (plurality opinion).

Importantly, Justice Scalia's plurality opinion did not identify any prior case law expressing constitutional approval for purely partisan motivations as legitimate reasons for the drawing of district lines. Rather he cited cases which recognized that as a practical matter partisan considerations were commonly considered in redistricting, and which passed no judgment on whether such considerations, absent additional nonpartisan considerations, could be a legitimate government interest or a lawful basis for government action. *See id.* at 285–86 (plurality opinion) (citing *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition."); *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics."); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences.")). Nevertheless, Justice Scalia cited those cases as support for his conclusion that the objective of seeking partisan advantage could be a legitimate basis for a redistricting plan, so long as the partisan purpose and effect were not "excessive."

In *Vieth*, Justice Kennedy accepted that the excessiveness of a partisan gerrymander could be part of an undefined constitutional standard and held open the possibility that criteria for a "clear, manageable, and politically neutral" constitutional standard could be developed in the future. *Id.* at 307–08 (Kennedy, J., concurring in the judgment). But he also cautioned against "adopting a standard that turned on whether the partisan interests in the redistricting process were excessive," because "[e]xcessiveness is not easily determined." *Id.* at 316. He suggested that the proper inquiry might instead be purpose-directed, assessing

under the First Amendment whether "political classifications were used to burden a group's representational rights." *Id.* at 315. He observed that "[i]f a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation . . .' we would surely conclude the Constitution had been violated." *Id.* at 312.

Although Justice Kennedy articulated a potential purpose-based First Amendment inquiry in *Vieth*—which would prohibit partisan intent to burden a particular class of citizens through redistricting—in *LULAC*, he did not accept appellants' assertion that the Texas redistricting plan at issue was unconstitutional because its sole purpose was to seek partisan advantage. *LULAC*, 548 U.S. at 417. That plan was left to avowedly burden voting rights.

B. Identifying partisan advantage as an illegitimate basis for redistricting would address the concerns expressed in *Vieth*.

Dissents by Justice Stevens and Justice Breyer in *Vieth* and *LULAC* articulate a standard that addresses the concerns originally framed by Justice Kennedy in *Vieth*. That standard, which asks "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles," *Vieth*, 541 U.S. at 336–39 (Stevens, J., dissenting) is "clear, manageable, and politically neutral" and does not turn "on whether the partisan interests in the redistricting process were excessive." *Id.* at 307–08, 316 (Kennedy, J., concurring in the judgment).

Applying that same test in his dissent in *LULAC*, Justice Stevens, joined in relevant part by Justice

Breyer, expressed the view that the redistricting's "sole purpose of advantaging Republicans and disadvantaging Democrats" meant that the state had failed its "constitutional requirement that state action must be supported by a legitimate state interest." *LULAC*, 548 U.S. at 462–63 (Stevens, J., concurring in part and dissenting in part). They cited the overwhelming evidence of purely partisan motivations for the 2003 Texas redistricting plan in concluding that "it is perfectly clear that judicially manageable standards enable us to decide the merits of a statewide challenge to a political gerrymander." *Id.* at 447 (Stevens, J., concurring in part and dissenting in part).

Building on Justice Stevens's and Justice Breyer's dissents, two recent three-judge district court panel decisions, the decision below and the decision of the panel in *Common Cause v. Rucho*, 1:16-CV-1026 (M.D.N.C. Jan. 9, 2018), have held that the core constitutional inquiry in partisan gerrymandering cases should be whether plaintiffs can demonstrate that the illegitimate purpose of partisan advantage—as opposed to legitimate state interests—motivated the redistricting plan at issue. In *Common Cause*, the panel held that the 2016 North Carolina legislature's redistricting plan violated the Equal Protection Clause, as well as the First Amendment and the Election Clause, U.S. Const. Art. I, § 4, because the plan "was enacted with discriminatory intent and resulted in discriminatory effects" and "its discriminatory effects are [not] attributable to the state's political geography or another legitimate redistricting objective." 1:16-CV-1026, at 81. The panel's analysis focused primarily on partisan purpose but also required a showing of discriminatory effect and causation. Plaintiffs were not required to meet a heightened standard of *excessive* discriminatory effect in order to meet their burden

of proof under any of the three constitutional claims put forward. *Id.*

Similarly, in this case, the three-judge district court panel below concluded that a cognizable claim that a redistricting plan violated the First Amendment required proof of "specific intent to impose a burden on [a class of individuals] because of how they voted or the political party with which they were affiliated"; "injury . . . that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse impact"; and "causation—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." *See Shapiro v. McManus*, 203 F. Supp. 3d 579, 596–97 (D. Md. 2016). Again, under the test articulated by the court, if partisan impact was demonstrated plaintiffs would need to show only that the effect was "tangible and concrete," not extreme. *Id.*

II. REDISTRICTING TO ACHIEVE A PARTISAN ADVANTAGE IS INCONSISTENT WITH THE LONG-RECOGNIZED CONSTITUTIONAL NORM AGAINST GOVERNMENT PARTISANSHIP AS A LEGITIMATE GOVERNMENT ACTIVITY.

Allowing redistricting for the purpose of achieving partisan advantage is squarely at odds with the Court's prior holdings in related areas of constitutional law that partisanship cannot be a legitimate government purpose. As reflected in this Court's First Amendment, Fourteenth Amendment, and Elections Clause jurisprudence, constitutionality should not turn primarily on the degree of harm resulting from partisanship, but rather upon the fact that partisan advantage was the basis for a map's design. These

cases illustrate an overarching constitutional norm against government action to seek partisan advantage as a legitimate government activity.

A. The Court's First Amendment decisions support the norm that government action for partisan advantage is illegitimate.

The First Amendment norm rejecting the legitimacy of government partisan purpose is long-standing, and redistricting for the purpose of partisan advantage should be understood to violate that norm. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). When the government designs an electoral map for the purpose of attaining partisan advantage, the government is intentionally burdening the core First Amendment rights of citizens with competing political beliefs and associations. Such action does not further legitimate state interests.

In *Vieth*, Justice Kennedy explained that allegations of partisan gerrymandering "involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (citing *Elrod*, 427 U.S. 347). He explained that a First Amendment inquiry would focus on "whether political classifications were used to burden a group's representational rights." *Id.* at 315 (Kennedy, J., concurring in the judgment). In his dissent in *Vieth*, Justice Stevens also suggested a First Amendment

analysis: "'[P]olitical belief and association constitute the core of those activities protected by the First Amendment' . . . . It follows that political affiliation is not an appropriate standard for excluding voters from a congressional district." *Id.* at 324–25 (Stevens, J., dissenting) (quoting *Elrod*, 427 U.S. at 356).

More recently, in *Shapiro v. McManus*, an earlier decision in this case, this Court reversed the three-judge district court's dismissal of the plaintiffs' First Amendment partisan gerrymandering claim because the Court found that the claim was not "'constitutionally insubstantial.'" 136 S. Ct. 450, 456 (2015) (explaining that Justice Kennedy in *Vieth* had "surmised that if 'a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation'" and that "[w]here it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention . . . ." (quoting *Vieth*, 541 U.S. at 315)). The panel below went on appropriately to adopt a standard that reflected the long-standing First Amendment norm prohibiting a partisan purpose for state action absent a legitimate state interest. *Benisek v. Lamone*, 266 F. Supp. 3d 799, 801–02 (D. Md. 2017) (citing *Shapiro*, 203 F. Supp. 3d 579, 596–97 (D. Md. 2016)).

These district court opinions are consistent with the long-standing norm against government action for partisan advantage under the First Amendment, as adopted in the Court's government patronage cases. Those decisions uniformly reject government employment decisions made because of partisanship, which the Court found to be an illegitimate government purpose, rather than on legitimate hiring criteria. The

Court explained that by conditioning employment on party affiliation, patronage burdens political belief under the First Amendment and, more broadly, harms the democratic process. *Elrod*, 427 U.S. at 355–56. The Court stressed that partisan patronage is not unconstitutional because of the degree of partisanship, but because the employment decision is based on partisan purpose.

B. The Court's Fourteenth Amendment decisions support the norm that government action for partisan advantage is illegitimate.

The Court's decisions under the Fourteenth Amendment likewise adopt the norm against government action to create partisan advantage. The Equal Protection Clause prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To show a violation of the Equal Protection Clause, plaintiffs must prove that there was both a discriminatory purpose and effect, and if they do so, the burden shifts to the government to show that the discrimination was justified by a legitimate state interest. *See Washington v. Davis*, 426 U.S. 229, 239–41 (1976) (describing the burden shifting framework under the Equal Protection Clause); *see also Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (describing the same in the context of the Equal Protection Clause's one person, one vote doctrine). Intent to advantage or to disadvantage a political party cannot be such a legitimate state interest. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) ("[B]are congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

Within its equal protection jurisprudence, this Court's one person, one vote doctrine prohibits even modest population deviations between legislative districts when those deviations are based solely on the illegitimate purpose of providing partisan advantage. To succeed under the one person, one vote doctrine, plaintiffs must show that it is more probable than not that a population deviation of less than ten percent is predominantly based on "illegitimate reapportionment factors" rather than "legitimate considerations." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1304, 1307 (2016). Even if the effect of the redistricting is relatively minor, it violates the Equal Protection Clause if it "serve[s] no purpose other than to favor one segment—whether racial, ethnic, religious, economic or political—that may occupy a position of strength . . . or to disadvantage a politically weak segment." *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring).

Decisions in the one person, one vote area support the norm against government action for partisan advantage. The Court applied the one person, one vote doctrine to a partisan gerrymandering case in *Harris v. Arizona Independent Redistricting Commission*, in a decision that strongly suggests that partisanship cannot be a legitimate consideration in redistricting. In *Harris*, the Court held that an Arizona Commission's redistricting plan did not violate the Equal Protection Clause because the population deviations it generated were based on a legitimate purpose—a good-faith effort to comply with the Voting Rights Act—rather than by a desire to seek partisan advantage. 136 S. Ct. at 1309. Justice Breyer, writing for the Court, reserved the question of whether "partisanship is an illegitimate redistricting factor" but stated that "[n]o legitimate purposes could explain"

the population deviations in redistricting in a previous case, *Cox v. Larios*, 542 U.S. 947 (2004), where the Court had found the map drawing was motivated by a desire to create partisan advantage. *Id.* at 1310. The logic of *Harris* strongly suggests that the Court considered such a partisan purpose to be illegitimate.

In *Larios*, Georgia Democrats had redistricted the state with "two expressly enumerated objectives: the protection of rural Georgia and inner-city Atlanta against a relative decline in their populations . . . and the protection of Democratic incumbents." 300 F. Supp. 2d 1320, 1325 (N.D. Ga. 2004). A three-judge district court panel held that the partisan gerrymander violated the one person, one vote doctrine and that in districting, "each population deviation requires at least *some* plausible and consistently applied state interest to justify it . . . and the defendant's two proffered justifications are plainly impermissible." *Larios*, 300 F. Supp. 2d at 1352–53 (emphasis in original). This Court affirmed, holding that "the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents . . . did not justify the conceded deviations from the principle of one person, one vote." *Larios*, 542 U.S. at 949. This Court made clear that the one person, one vote violation was triggered not by the magnitude of the population deviation, but rather by partisan-motivated redistricting with no legitimate purpose. *See id.* at 949–51.

C. The Court's Elections Clause decisions support the norm that government action for partisan advantage is illegitimate.

The constitutional norm against partisan government action also drives the Court's decisions related to the administration of elections. The Elections Clause, U.S. Const. Art. I, § 4, delegates authority to states to

establish procedures for congressional elections. The Court has made it clear that this clause is only a delegation of authority to adopt procedural regulations for congressional elections; it does not permit states to favor or to disadvantage particular candidates. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995). States are not permitted to dictate electoral outcomes based on candidates' political positions because such action would constitute an illegitimate purpose and would be inconsistent with the constitutional norm against government action in support of partisan advantage. *See Cook v. Gralike*, 531 U.S. 510, 526–27 (2001) (unanimous court); *Thornton*, 514 U.S. at 833–34 ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.").

In *Cook v. Gralike*, the Court overturned a Missouri constitutional amendment requiring each candidate's position on congressional term limits to be printed on the ballot because the amendment had the purpose of favoring certain candidates over others. 531 U.S. at 524. The Court found that the law violated the Elections Clause because it sought to "dictate electoral outcomes" based on candidates' positions. *Id.* at 524–27; *see also Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) ("[A]dministration of the electoral process is a matter that the Constitution largely entrusts to the States. But . . . States may not infringe upon basic constitutional protections.").

Similarly, courts have emphasized the illegitimacy of government election administration with a partisan purpose in striking down voter identification laws and

early voting restrictions on nonracial bias grounds. In *Obama for America v. Husted*, the Sixth Circuit affirmed a district court's injunction of an Ohio law limiting early voting because the law discriminated between classes of voters in violation of the Fourteenth Amendment. The court in *Husted* drew upon this Court's holding in *Bush v. Gore* that "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 888 F. Supp. 2d 897, 910 (S.D. Ohio 2012) (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)).

Consistent with the constitutional norm established in these cases, the panel in *Common Cause* held that redistricting of congressional districts for partisan advantage violates the Elections Clause. The panel concluded that the North Carolina 2016 redistricting map "disfavor[ed] the interests of supporters of a particular candidate or party in drawing congressional districts," showed bias toward a specific political party, and was an "impermissible effort to 'dictate electoral outcomes' and 'disfavor a class of candidates.'" 1:16-CV-1026, at 178 (quoting *Thornton*, 514 U.S. at 833–34). The panel held that the redistricting "violates the Elections Clause by 'infring[ing] upon basic constitutional protections.'" *Common Cause*, 1:16-CV-1026, at 178 (quoting *Kusper v. Pontikes*, 414 U.S. at 56–57).

III. REQUIRING THE GOVERNMENT TO ESTABLISH THAT THE PARTISAN EFFECTS OF REDISTRICTING WERE THE INCIDENTAL RESULT OF ITS PURSUIT OF LEGITIMATE STATE INTERESTS WOULD PROVIDE A CLEAR AND ADMINISTRABLE STANDARD AND A MEANINGFUL CHECK ON ILLEGITIMATE PARTISAN GERRYMANDERING.

An electoral map with partisan effects that can be explained only by the intent to achieve partisan advantage violates the Constitution. However, a map with partisan effects that can be explained as the necessary consequence of the government's pursuit of legitimate state interests—such as respect for traditional political boundaries and subdivisions, compactness and contiguity, and the preservation of communities of interest—must be upheld. Focusing the constitutional inquiry on the requirement of a legitimate state interest in redistricting, rather than on the excessiveness of the partisan effects, would render unnecessary the need to define excessiveness of partisan effect that has proved so vexing for the courts since *Vieth*.

A. A constitutional standard based on a rejection of partisan advantage would provide a meaningful and low-burden check on the redistricting process.

Under the proposed standard, the government would need to demonstrate that the partisan effects of a redistricting plan were the incidental result of the government's pursuit of legitimate state interests rather than an effort to provide an advantage to one political party at the expense of another. A redistricting plan would be upheld if the government successfully showed

that the partisan effects of redistricting were indirect but necessary results of legitimate state interests. If plaintiffs established both partisan intent and effects, and the government could not explain the partisan effects of its redistricting plan as the product of legitimate state interests, a map would be struck down as the unconstitutional result of lawmaking based on the "naked purpose to disadvantage a political minority." *Vieth*, 541 U.S. at 336–37 (Stevens, J., dissenting); *cf. Romer v. Evans*, 517 U.S. 620, 632–36 (1996) (ruling that bare animus to disadvantage a group, even outside a fundamental right or protected class, does not qualify as a legitimate state interest); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) (concluding that equal protection "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

Such a standard would be familiar. As highlighted in Part II, *supra*, constitutional standards based on partisan purpose already control in related areas of law under the First Amendment, Fourteenth Amendment, and the Elections Clause. In considering a challenge to partisan redistricting under the one person, one vote doctrine in *Harris v. Arizona Independent Redistricting Commission*, the Court concluded that a plaintiff must show that "it was more probable than not that the use of illegitimate factors significantly explained deviations from numerical equality." 136 S. Ct. 1301, 1310 (2016). Similarly, prior to *Vieth*, *Davis v. Bandemer* required courts to assess whether a redistricting plan constituted "intentional discrimination against an identifiable political group." 478 U.S. 109, 127 (1986). In addition, courts have long assessed legislative purpose in the context of racial discrimination claims under the Fourteenth Amendment. *See,*

e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding a zoning ordinance did not violate the Constitution because there was no proof that "discriminatory purpose was a motivating factor in the Village's decision"). As evidenced by its application in related contexts, the proposed standard would be "clear, manageable, and politically neutral." *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment).

A redistricting body might attempt to cloak an impermissible partisan purpose in a pretextual rationale. Indeed Justice Scalia and others have expressed concern that the government will always offer a "neutral explanation" for a partisan gerrymander. *Id.* at 300 (plurality opinion). Yet courts have shown themselves adept at analyzing whether explanations are genuine or pretextual. In egregious cases, like those presented by the 2001 Georgia House of Representatives and 2002 Georgia Senate redistricting plans at issue in *Cox v. Larios*, 542 U.S. 947 (2004), courts would have no trouble in determining that the partisan effects of the redistricting resulted from a government purpose to advantage one political party. In *Whitford v. Gill*, the district court found that it could distinguish between the impermissible partisan purpose that predominated and the pretextual recitation of compactness and contiguity that was facially consistent with the final redistricting plan. 218 F. Supp. 3d 837, 891–96, 922–27 (W.D. Wis. 2016). In that case, although the electoral districts were largely compact and contiguous, the court rejected the State of Wisconsin's claim that the redistricting plan could be justified in terms of legitimate state interests because the redistricting body had considered and intentionally rejected numerous alternative maps that achieved the same degree of

compactness and contiguity in favor of maps with greater and more durable partisan effect. *Id.*

The necessary inquiry into illegitimate partisan purpose also may be helpfully informed by empirical measures of partisan effect such as the "efficiency gap" metric put forward by Eric McGhee. *See* Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 LEGIS. STUD. Q. 55 (2014). As recognized in *Common Cause* and *Whitford*, empirical measures of partisan effect are probative as to the true purpose of the redistricting body in implementing the redistricting plan at issue. The more substantial the partisan effect, the less likely it is that a redistricting plan was motivated by a legitimate state interest.

In addition to empirical measures of a partisan effect, other indicia of impermissible intent can be helpful in identifying partisan purpose: the timing of the redistricting effort (e.g., mid-decade versus constitutionally mandated decennial redistricting), the deviation from prior procedural norms in the redistricting process, the proportion of same-party incumbents forced to compete in the same district, the use of partisan experts in drawing redistricting, the relative partisan effect of proposed maps as compared to the selected redistricting plan, and the contemporaneous statements from individuals involved in the redistricting process as well as their subsequent testimony.

While pretextual explanations can be discredited, under the Court's current standards, many legislators do not even bother with a pretext. Unworried about judicial intervention against gerrymandering, members of redistricting bodies have with increasing frequency openly acknowledged that the motivation underlying a redistricting plan was to entrench one political party at the expense of another. *See, e.g.*, *LULAC*, 548 U.S.

at 453 ("According to former Lieutenant Governor Bill Ratliff, a highly regarded Republican member of the State Senate, 'political gain for the Republicans was 110% of the motivation for the Plan, . . . it was the entire motivation.'") (internal quotation mark omitted) (Stevens, J., concurring in part and dissenting in part). Legislators have not infrequently advanced a facially neutral rationale, but then have spoken in more candid terms that provide direct evidence of partisan intent. For example, in the run-up to the 2012 presidential election, Pennsylvania House Republican leader Mike Turzai asserted that Pennsylvania's voter-identification law, which had purportedly been designed to protect the integrity of the ballot from voter fraud, was "gonna allow [Republican presidential nominee Mitt] Romney to win the state of Pennsylvania, done." Mackenzie Weinger, *Pa Pol: Voter ID Helps GOP Win State*, POLITICO (June 25, 2012), https://www.politico.com/story/2012/06/pa-pol-voter-id-helps-gop-win-state-077811 (quoting Rep. Turzai).

While a purpose-focused standard would provide a meaningful check against partisan gerrymandering, it would not exclude political bodies from their traditional role in redistricting. It would neither burden political actors with a standard of conduct that would be difficult to meet, nor pose a risk that all redistricting decisions would become subject to judicial challenge. As Justice Breyer explained in *Vieth*, "The use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends." 541 U.S. at 360 (Breyer, J., dissenting). Under the proposed standard, an inquiry into legislative purpose will arise only when a plaintiff is able to present evidence of a partisan bias in a redistricting plan, and would lead to the overturning of a

redistricting plan only if a state is unable to put forward a legitimate state interest explaining the redistricting plan's partisan effect. Just as the courts are not flooded with one person, one vote cases, only a small minority of redistricting plans are likely to raise serious questions regarding their constitutionality under a purpose-based standard.

B. Requiring the government to ground its decisions in a legitimate purpose would provide essential support for well-established constitutional norms.

While such a standard might directly invalidate only a relatively limited number of redistricting maps where the government cannot articulate a legitimate, non-pretextual purpose for the redistricting plan, the rule would provide a strong motivation for government officials to adhere to constitutional principles and to internalize a "sense of constraint" on partisan excesses in the redistricting process. This is precisely what has taken place in the context of racial gerrymandering, where, following *Shaw v. Reno*, 509 U.S. 630 (1993), legislatures internalized the principles underlying that decision and have generally conformed the redistricting process to those principles. *See* Richard Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 68–70 (2004). If the Court imposes a clear rule prohibiting partisan gerrymanders, legislators would be less likely to describe redistricting in terms of "cannibaliz[ation]" of the other party, *see Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001), or assert that redistricting is "the business of rigging elections." *See* John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON SALEM J. (Jan. 27, 1988) (quoting State Senator Mark McDaniel criticizing the North Carolina

legislature). Instead, legislators would need to identify and articulate a basis for redistricting that adheres to democratic principles. Driven by the law requiring them to do so, legislatures would be far more likely to design districts that actually do conform to those principles.

CONCLUSION

Amicus hopes that the proposed constitutional approach articulated in this brief will help this Court in its consideration of the appropriate constitutional standard where partisanship is the purpose of the redistricting.

Respectfully submitted,

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